ROMAN AND CIVIL LAW IN AMERICA.

TIMES change and we change with them. A few years ago a large majority of lawyers in England and in our own country were in conscious or unconscious sympathy with the views of Blackstone, and thought of the civil law as something closely associated with arbitrary power in government and persecution in religion. As for the especial jurisprudence of the United States, there was a vague idea that something like the Code Napoleon existed in a little corner of the Union called Louisiana, but just why or how it happened to be there was a matter of languid interest. The events of the last five years have changed all that. It has suddenly occurred to us that Roman and civil law lie at the basis of social life not only in Louisiana but in Porto Rico, Cuba, and the Philippines, as well as in Lower Canada, Mexico, Central America, and South America. The subject forces itself on the attention of the student, and challenges his investigation, if only on the lowest ground of possible advantage to himself in his professional career.

In discussing our subject in a brief and very general way, it is necessary to consider the development of law in France and Spain; for, whatever elements of Roman and civil law we have in the Americas came, broadly speaking, through and from those two countries; whatever may have been contributed by Portugal being of Spanish type and not requiring special discrimination.

Beginning with France, while it was still known as Gaul and was a Roman province, it was governed by Roman methods and received the Roman law of the early imperial period. The Empire of the West went to pieces in the fifth century of our era, some fifty years before the compilations of Justinian. The barbarian conquerors could overrun the country, but they could not divest themselves of the reverence they had for the institutions of the empire, and especially for the system of law which, in its scientific development by the early jurists, appealed to them in the same way that Greek sculpture appeals to an American artist; and so we find them framing codes for their conquered subjects based on Roman law, no doubt preparing such compilations with the help of such jurists as they could employ. Thus, we have the Edict

of Theodoric, the Ostrogoth, who for a time reigned over a part of Southern Gaul, a work probably prepared by Cassiodorus, a Roman jurist and philosopher who was attached to the court of Theodoric. This code was promulgated about the beginning of the sixth century. We find next, as underlying part of the French law, the Breviary of Alaric II., sometimes called the Roman law of the Visigoths, or West Goths, which had its domain in Southern Gaul because Southern Gaul as well as Spain was part of the Visigothic kingdom. This important compilation may be noticed again when we come to the law of Spain. Another code was the compilation known as the Lex Romana Burgundiorum prepared by Gundobold of Burgundy in the early part of the sixth century, for the use of his Roman subjects in the territory that afterwards became a portion of France.

But French law was not destined to be entirely Roman in its character. Another important influence was added in the form of what we call the "barbarian laws" proper, such as those of the Salian Franks, the Ripuarian Franks, and the like. These were Teutonic customary laws, and were what might be expected from such a people at such a period in their development; systems in which the primitive ideas of family, clan, status, torts and penalties play a large part.

To the influence of these customary laws may be added the constant modifications made by legislative power of some kind. Thus, an important factor in the formation of the French law is found in the "Capitularies," or laws issued by the kings of the "first and second race," from the sixth to the tenth century, and which received the approbation, either express or implied, of the councils or the assemblies of the people. Following these were the ordinances of the "third race of kings," from the time of Hugh Capet, in the latter part of the tenth century, down to the French Revolution. The power of the monarch was more and more displayed in these edicts, which resembled, in a way, the constitutions of a Roman emperor. A prominent example is found in that ordinance of Louis XIV. concerning maritime law, which has played such an important part in modern commerce and admiralty.

And here we may refer to the difference which was so marked in France between what was known as the Country of the Written Law on the one hand, and the Country of the Customary Law on the other. The former was simply that southern portion which had

fallen under the dominion of the written Roman codes which we have mentioned of the early part of the sixth century; the latter was the northern portion of France, where the customs derived from Teutonic sources, from local grants and charters, and from the feudal system as differently applied in different provinces, grew into a body of local customary law.

There were many of these different jurisdictions, each with its custom, receiving its name from the province in which it prevailed, such as the Custom of Orleans, the Custom of Normandy, the Custom of Brittany, and the like; but naturally one of the most important among them was what was called the Custom of Paris. That city had become more and more the center of civilization and learning, and was distinguished for its revival of the study of Roman law, especially in the eleventh and twelfth centuries. When, therefore, in the seventeenth century, France began to take up seriously the work of colonization in America, and to provide some kind of law for her possessions in the western world, it was prescribed that the laws, edicts, and ordinances of the realm, of a general character, and the Custom of Paris should be extended to these colonies.

The system thus transplanted may perhaps be best illustrated by comparing it with the French language itself, which had grown up in much the same way, and had been formed of similar factors. The legal system, then, while it contained many elements of Teutonic origin, was Latin at its base. Roman Law, as developed by the studies and labors of the mediæval jurists, had been wrought into it and had contributed the form and style, the logic, the maxims, the elementary principles of juristic philosophy to this body of legal doctrine.

In proceeding with the study of Roman and civil law in the Americas, we may begin with what we now call the Dominion of Canada. The first settlement was made by Jacques Cartier, a French navigator, who sailed up the St. Lawrence in 1535. Quebec was founded in 1608, some years, therefore, before the Pilgrims landed at Plymouth Rock. Montreal became an outpost and point of departure for fur trade and discovery. Canada, or New France, was a vast domain, extending as far to the west and southwest as her pioneers could explore and possess. It was to this immense territory that the laws, edicts, and ordinances of France and the Custom of Paris were extended; and so the elementary principles of Roman law may be said to have emigrated

slowly, indeed, but surely, from the banks of the Tiber to the banks of the St. Lawrence and the Great Lakes. As the French explorers pushed their way to Detroit, Mackinac, and the Upper Mississippi, and established their settlements and posts, they took this system with them. It is a curious fact that, in theory at least, the Custom of Paris was in force in Michigan and in Wisconsin, a part of that territory, down to the year 1810, when the legislature of Michigan, declaring substantially that it did not know what the Custom of Paris was, and that there were no easy means of finding out, enacted a statute abolishing the whole system and adopting the principles of law that prevailed in the other states of our country so far as applicable to the situation.[1]

Canada remained under French domination for about one hundred and fifty years. In 1759 the English army under Wolfe captured Quebec. In 1760 the English conquest of Canada had been completed, and by the treaty of 1763 the entire territory was transferred to England. The question, of course, presented itself as to what should be done, in the legal way, with these new possessions. A part of the vast domain was inhabited by French people who had been living for generations under the laws and ordinances of France and the Custom of Paris; that is, under the system partly Roman and partly mediæval, which has already been briefly described. The English government acted wisely. The principles of English law were introduced in criminal matters,[2] but private law in civil matters was left undisturbed. It resulted that in Canada that portion which had been largely settled, and which is now called the Province of Quebec, retained its system of private law in civil matters derived from France; while in the portion of territory lying farther west, and which was to be settled by English emigrants, a different result was reached.

By the Statute 31 George III., Chapter 31, enacted in 1791, Canada was divided into two parts, Lower Canada and Upper Canada; and the legislature of Upper Canada in due time adopted English law as the basis of her institutions. In 1867 the Dominion of Canada was established, but a specific account of its different provinces need not here be given.

Returning to the Province of Quebec, or Lower Canada, we find, therefore, that Roman and civil law still constitute the basis of juris-

[1] Interesting references to this legislation may be found in the cases of Lorman *v.* Benson, 8 Mich. 18, 25; and Coburn *v.* Harvey, 18 Wis. 156, 158.

[2] By the Statute of 14 George III., Chapter 83.

prudence so far as they were introduced during the seventeenth century. The legal system has been gradually developed and improved along its original lines, and in the year 1866 a civil code of Lower Canada was promulgated which is an excellent specimen of juristic work. It follows the general theory and logic of the French code, and contains, therefore, many elementary principles of Roman and civil law; but it is, of course, different in some local details, and it includes an elementary treatise on commercial law.

This code contains four books. The first book concerns persons and their status. The second book concerns property, its ownership and modifications. The third book concerns the acquisition of property by succession, donation, testament, and the force of obligations; and also treats of obligations in general, as arising from contract, quasi-contract, tort, neglect, and the operation of law; and of the different kinds of obligations and their extinction. It then takes up the different kinds of contracts, and next deals with privileges and mortgages, and the formalities of recording real rights; and concludes with the rules in regard to prescription, both as to the acquisition of property and as to the barring of suits. The fourth book is a brief code of commerce, treating of bills, notes, and checks, merchant-shipping, carriers, insurance, bottomry, and respondentia.

They have also a code of procedure in Quebec upon the details of which we need not dwell. In brief, we find in the Dominion of Canada, as among ourselves, a part of the country looking to the civil law as fundamental and the rest to the English law.

Turning now to that other great colony established by France in the last years of the seventeenth century and to which LaSalle gave the name of Louisiana, we find its legal history in some respects quite similar. The Louisiana of LaSalle was not bounded by the limits of the state which now bears that name. It extended in theory at least from the Gulf of Mexico to the dim regions which now constitute British America, and westwardly to the Rocky Mountains, and possibly to the Pacific. It formed part of a plan of empire intended to reach from the Gulf of St. Lawrence by way of the lakes to the Gulf of Mexico. Soon after the first feeble colony was planted near Biloxi, its entire commerce, with a considerable control of its government, was granted by charter to Anthony Crozat, a French merchant; it being provided that the territory as described should remain included under the style of the government of Louisiana and be a dependency of the govern-

ment of New France, or Canada, to which it was to be subordinate. By another provision of this charter, the laws, edicts, and ordinances of the realm, and the Custom of Paris, were extended to Louisiana. The system of law thus introduced was the same as that which had been established in Canada, or New France, and continued to develop on these lines until the year 1763, when France, by a secret treaty, ceded to Spain all that portion of Louisiana which lay west of the Mississippi, together with the city of New Orleans, and the island on which it stands. Soon after, by the treaty of Paris, the boundary between the French and British possessions in North America was fixed by a line drawn along the middle of the Mississippi, from its source to the river Iberville, and thence by a line in the middle of that stream and Lakes Maurepas and Pontchartrain to the sea. France ceded to Great Britain the river and port of Mobile and everything she had possessed on the left bank of the Mississippi, except the town of New Orleans, and the island on which it stood. As all that part of Louisiana not thus ceded to Great Britain had already been transferred to Spain, it follows that France had now parted with the last inch of soil she held on the continent of North America.

With the Spanish domination in Louisiana, there came some elements of Spanish law and jurisprudence. The first Spanish governor, O'Reilly, caused a code of instructions to be published in reference to practice, according to the laws of Castile and the Indies, to which was annexed an abridgment of the criminal laws, and some directions in regard to wills. From that period, as Judge Martin states in his history,[1] it is believed that the laws of Spain became the sole guide of the tribunals in their decisions; but, as these laws and those of France proceed from the same origin, the Roman law, and there was great similarity in their dispositions in regard to matrimonial rights, testaments, and successions, the transition was hardly perceived before it became complete, and very little inconvenience resulted from it.

We defer for a moment more an account of the origin of Spanish law and jurisprudence, and follow out the early history of Louisiana after it became an American possession. In the last months of the eighteenth century, a treaty was concluded between France and Spain, by which the latter agreed to restore to France the province of Louisiana. France, however, did not receive for-

[1] Martin's Louisiana, 2d ed. p. 211.

mal possession until November 30, 1803, when, in the presence of French and Spanish officers, the Spanish flag was lowered, the tri-color hoisted, and a formal delivery made to the French commissioner.

France remained in actual possession only twenty days. The province had already, in April, 1803, been ceded to the United States, and on December 20, 1803, the United States took possession. In 1804, the Territory of Orleans was established by act of Congress, including in its boundaries about the area of the present State of Louisiana. The rest of the immense purchase was at first erected into the District of Louisiana; then in 1805, into the Territory of Louisiana, and then in 1812, into the Territory of Missouri. And so the present State of Louisiana, on the one hand, and the other states which have been carved out from the remainder of the Louisiana purchase parted company in the juridical way; Louisiana continuing its adherence to the civil law in many important matters, and the other states receiving what we loosely call the common law, that is, the English and American law, brought in the natural and normal way by immigration of pioneers from the common law states.

Thus far, we have spoken, of course, of municipal law in civil matters. As for the criminal law, it was felt that it would not be proper to continue the Spanish methods, and it was understood that the Territory of Orleans would not be admitted to statehood until some change had been made in this matter. Accordingly, in 1805, by two territorial statutes which were admirably drawn, and which are still practically in force with a few amendments, it was provided that the common law of England should be the basis of jurisprudence and practice in criminal cases.

In 1808 a civil code of law was adopted by the territorial legislature in Orleans, based to a considerable extent on a draft of the Code Napoleon, and prepared by Messrs. Brown and Moreau-Lislet. This code was revised in 1825, and at the same time a code of practice was promulgated which is a model of brevity and simplicity, and which has been very little amended, — so little that the number and order of the articles have remained unchanged.

By an act of 1828 all the civil laws in force before the promulgation of the codes, with a single exception, were declared abrogated. It was decided, however, by the Supreme Court that the Roman, Spanish, and French civil laws, which the legislature thus

repealed, were the positive, written or statute laws of those nations and of Louisiana, in so far as they were introductory of new rules, and not those which were merely declaratory; and that the legislatures did not intend to abrogate those principles of law which had been established or settled by decisions of the courts of justice. The result is understood to be that the codes of Louisiana — which were again amended, in 1870, for the purpose chiefly of omitting matters rendered obsolete by the late Civil War — are interpreted when necessary, first, by the decisions of her courts, and secondly, in the absence of such, by the principles of civil law so far as they may be properly applied to the subject matter and to the conditions of modern life.

No code of commerce or of evidence has ever been adopted in the State of Louisiana, and it has been settled that in commercial matters we will follow the law merchant of England and of the other states of the Union, and that in matters of evidence we will be governed by English and American elementary rules and decisions, so far as they are not modified by statute or code. When it is remembered that in the federal courts we have the admiralty and chancery system in full operation, it will be seen that the strata are numerous which have been from time to time deposited in the legal alluvion which has been formed about the mouth of the Mississippi. So far as the elementary laws of person and property are concerned, and the equally important law of obligations is to be applied, we may be said in Louisiana to be a civil law state. So in the matter of pleading and procedure, we have substantially the practice which prevailed in the time of Justinian, and which lies at the basis of admiralty and equity practice and at the basis of what is called the reformed code procedure in the United States. But in the matters of criminal law, of the law merchant, and the general rules of evidence, we resemble the other states of the Union.

Coming now to those parts of the Americas which have derived their legal systems from Spain, we may recur to the evolution of law in the Spanish peninsula, and inquire how Roman and civil law have come to Mexico, Central America, and South America, and especially to our new possessions. We need not dwell on the early career of the Greek, Phœnician, and Carthaginian colonies in the Spanish peninsula. We may begin with the time of Augustus, when Spain was highly organized under the Roman system of municipalities and enjoying for a long time what was called the

Roman peace. The country became highly civilized, and distinguished men, like Trajan and Martial, were natives of the province. The law was that of the classical period of Rome, as modified by the local situation. It was the law of Gaius, of Ulpian, of Papinian, applied and extended by imperial constitutions or decrees.

In the fourth century of our era a great change took place, which has left its impress, as we have seen, upon the juristic life and thought of both France and Spain, and has in that way influenced the legal history of both French and Spanish colonies. The Visigoths, or West Goths, came, after the fashion of the time, partly as invaders and partly as immigrants, who cherished in their rude way admiration and allegiance to the Roman Empire. They obtained possession of the southern part of Gaul and a large portion at least of the Spanish peninsula. In the fifth century the Visigothic kingdom became practically independent of Rome.

Under Euric and Alaric II., in the beginning of the sixth century, the codification was prepared, known sometimes as the Breviary of Alaric II., to which reference has already been made, a compilation of much importance as a matter of fundamental legal history. It antedated by some years the works of Justinian, and in this respect alone possesses considerable interest. Furthermore, it was prepared in pursuance of the principle of personal laws for the use of Roman subjects of this west Gothic kingdom. It contained sixteen books of the Theodosian Code, a collection of imperial Novells or new imperial constitutions of more recent date; the Institutes of Gaius compressed into two books and sometimes called the Gothic Epitome of Gaius; some *sententiæ* or opinions of Paul; some portions of the Gregorian and Hermogenian codes, and finally one passage from the writings of Papinian. In this way, amid the many chances and changes of this turbulent epoch, many of the best portions of the classical law of Rome were preserved, and the Breviary of Alaric II. became Roman law for Western Europe, at least until the revival of the legal studies in the twelfth century, when, as Professor Sohm has remarked, this *corpus juris* of the German king was destroyed by the *corpus juris* of the emperor of Byzantium.

In the seventh century the Spanish code known as the *Fuero Juzgo* was promulgated. The name is significant as indicating perhaps the formation of the Spanish language. It is a contraction of *Fuero de los Jueces*, which in turn is a modification of the words *forum judicum*. We might translate *Fuero Juzgo*, there-

fore, as a guide or code for the judges; or, to use more general terms, as a system of jurisprudence. Opinions differ very widely as to the merits of this work, but it certainly presents an interesting amalgamation of Roman law with Gothic or Teutonic customs.

Passing over some other compilations, we find it probable that the juris-consults of Spain in the twelfth and thirteenth centuries began to take part in the general revival of legal studies and of the works of Justinian which had become so extensive in Italy, France, and England. In the year 1255 Alphonso the Learned, the king of Castile and Leon, promulgated the *Fuero Real*, a treatise upon law, which may be considered to bear the same relation to the legal system of Spain at that time that the Institutes of Justinian bore to his Digest. This work was really preparatory to the framing and promulgation of the *Siete Partidas*, one of the most important and interesting codes that has ever been published in the course of legal development. This work was finally promulgated in the year 1348, in the reign of Alphonso II. It is divided into seven parts, as its name implies, this division possibly being an imitation of the seven parts of the Digest of Justinian, and having perhaps some reference to the supposed sacred character of that number. The *Partidas* are still worthy of careful study, since they are fundamental in the law of Spain and her colonies. When the French colony, known as Louisiana, was ceded to Spain in 1760, the code known as the *Partidas* was introduced and became really a large part of the fundamental law of the vast domain. Portions of it were translated into French for the benefit of the inhabitants. Some of its provisions remained as a part of the law of the State of Louisiana, and are referred to in the earlier decisions of her Supreme Court.[1] A translation of the principal portions of the work into English was made by Messrs. Moreau-Lislet and Carleton, and published in 1820, with an introduction giving an account of Spanish law as then existing.

We may mention in passing a code called the *Nueva Recopilacion*, promulgated in the time of Philip II., and the *Novissima Recopilacion*, adopted in 1805, in the reign of Charles IV. Nor should the celebrated code of maritime laws, called by the Spanish *El Consulado*, and generally referred to in our law books as the *Consolato del Mare*, be forgotten. This remarkable compilation made by order of the magistrates of Barcelona in the thirteenth

[1] Beard *v.* Poydras, 4 Martin 348.

century, is really fundamental in commercial and nautical affairs, and has obtained a great authority in the modern civilized world by its intrinsic merits.

We may also merely notice in passing the Code of Commerce, adopted in Spain in 1829, and may then pass on to much more recent codifications which are to-day the fundamental law of what we call our new possessions.

It is understood that as early as 1850 there were persistent efforts made in Spain to revise and codify her laws, but the final adoption of such codes was greatly delayed by the fact that in the various provinces the local *fueros*, charters, and customs were highly esteemed and jealously guarded. There was not the opportunity to sweep them away that was found in France with her revolution and her consulate, and the new codes were only finally adopted after a long delay and with a large reservation of local rights and customs. These reservations, however, would not, I suppose, affect their force in the colonies; and so far as our new possessions are concerned, I assume that the provisions of these codes are generally obligatory as private law in civil matters, so far as they have not been recently modified by authority of the United States.

Taking up these modern codes, their consideration may be arranged in chronological order as follows: The Code of Procedure of 1881, the Code of Commerce of 1886, the Civil Code of Law of 1889, and the Hypothecary Code, concerning mortgages, privileges, and their inscription, extended to the islands in 1893.

The Code of Procedure of 1881, which is in force in our new possessions, represents the Roman practice under the later empire, and is in theory the method of procedure which underlies admiralty and equity practice, and what we call the reformed code of procedure of the present day. It falls into two general divisions, — one concerning the "contentious jurisdiction," where parties are suing each other contradictorily, and the other concerning the "voluntary jurisdiction," where a party goes into court, generally in an *ex parte* way, as, for example, to open a succession, to probate a will, or to appoint a tutor. The pleadings follow the theory of the time of Justinian, and may be substantially stated as a petition by plaintiff and an exception or answer by defendant.

The Code of Commerce of 1886, which likewise prevails in our new possessions, contains four books: the first treating of commerce and commercial people in general; the second concerning

contracts which are especially commercial in their character, including mercantile companies, banks, and railways; the third treating of maritime commerce and the law of shipping; and the fourth making provisions in regard to respites and insolvencies, and prescription or limitations in commercial matters.

The Civil Code of 1889, which is, of course, a code of private law, is an interesting and important work. It is understood that Mr. Alonzo Martinez, one of the most distinguished of Spanish jurists, was one of its compilers. Its general plan is not unlike that of the Code Napoleon and other European codes of a similar character, as well as the civil codes of Lower Canada, Louisiana, and Mexico. It follows the division suggested by Gaius in the second century when he declares that all jurisprudence concerns persons, things, and actions. The subject of actions or the remedies by which persons may vindicate their rights to things is left to the Code of Procedure; and in general terms the Civil Code, therefore, treats of persons who may acquire rights in things or property; of things or property in which such rights may be acquired, and finally of obligations by the effect of which the property in things is often acquired or lost.

This Civil Code likewise contains four books. The preliminary title treats of laws and their effect and application. The first book contains twelve titles treating of the law of persons, whether as citizens or foreigners, as natural or juridical, as present or absent; with detailed provisions in regard to the relations of husband and wife, parent and child, tutor and minor, and general rules in regard to civil status and its proof.

The second book is divided into eight titles, and treats of things; that is to say, of property, ownership, and its modifications. It considers the subject of property as either immovable or movable; as public or private; as subject to ownership, either perfect or imperfect, and to the right of eminent domain, and lays down the rules in regard to its acquisition by accession, by possession, and by invention; and concludes with a statement of the law in regard to servitudes, whether personal in their character, as usufruct, use and habitation, or real servitudes or easements springing from the legal or conventional relation of different estates to each other. Rules are also given relating to the recording of documents which concern immovable property and real rights.

The third book, containing eighteen titles, treats of obligations, and is an interesting treatise upon that important subject, as it

presents itself to the mind of the jurist in the latter part of the nineteenth century. It declares that every obligation consists in giving, doing, or not doing something, and it recognizes that all legal obligations arise either from contract, from quasi-contract, from offense or active tort, from quasi-offense or negligence, and finally in some cases from an arbitrary provision of law. The different kinds of obligations are discussed, whether conditional or unconditional, divisible or indivisible, several, conjoint or solidary. It then takes up the subject of the extinction of obligations, and states that they may be extinguished by payment or fulfillment, by the loss of the thing due in certain cases, by the voluntary remission of the debt, by compensation or what we might call set-off, and by novation. It next proceeds to treat of the subject of contracts as one of the principal sources of obligations; the validity of contracts, the consent of the contracting parties, the object of contracts and their cause, their interpretation, rescission and nullity. The writers then discuss specific contracts, as those of marriage and dowry, and the community of goods existing between husband and wife, and then the contracts of sale, exchange, letting and hiring, rent and emphyteusis, partnership, mandate, loan, deposit, aleatory contracts such as insurance, compromise or transaction, suretyship, pledge, and hypothecation.

The writers then proceed to lay down the rules in regard to obligations arising in the absence of agreement: first, from quasi-contracts, in which obligations arise from certain lawful acts in the absence of an agreement; and secondly, from offenses or quasi-offenses where obligations arise from unlawful acts, whether of active wrong or passive negligence.

The remainder of the work is devoted to dispositions in regard to insolvency and the classification of debtors and creditors with regard to their rights, privileges, and preferences; and finally to the subject of prescription, or lapse of time, by which property and rights may be acquired, and by which rights of action are barred.

The style of the work is very concise and accurate. Mr. Levé, a French judge, writing in 1890, declares it to be a more scientific book than the Code Napoleon. Of course its compilers had the advantage of about a hundred years of discussion and commentary in Continental Europe on these subjects, to say nothing of similar work that had been done in the three Americas.

There is a supplemental provision of this Spanish code of 1889

which appears to be interesting and important, and which reads as follows:

"1. The president of the Supreme Court, and the presidents of the tribunals of appeal, will send to the minister of justice at the end of each year a report of the matters which have been submitted to them in civil cases; and they will point out the defects and difficulties which the application of this code may have revealed to them. They will indicate with detail the controverted questions and points of law as well as the articles or omissions of this code which have caused doubt to spring up in the courts.

"2. The minister of justice will transmit these reports and a copy of the civil statistics of the same year to the general commission of codification.

"3. After having taken cognizance of these documents, and of the progress realized in other countries which may be taken advantage of in our own, and of the jurisprudence of the Supreme Court, the commission of codification will formulate and address to the government every ten years a plan of such reforms as it may think proper to prepare."

We need not dwell upon the Code of Hypothecary Law, which appears to have been enacted in Spain in 1871, and extended to the islands in 1893. It contains an elaborate codification of the law in regard to mortgages of different kinds, whether conventional or legal, and the method of recording them in such a way as to notify third persons of their existence.

After this statement in regard to the history of Spanish law and of its extension to the islands which we now include as objects either of our ownership or protection, it would seem useful to inquire in the interest of legal science as to the future of jurisprudence in Porto Rico, Cuba, and the Philippines. It would seem that the example of the Louisiana purchase of 1803, as already detailed, might throw some light upon this interesting subject. For more than thirty years before that purchase, the vast domain called Louisiana had been a Spanish colony. It is true that in the early history of the French settlement, the laws and ordinances of France and the Custom of Paris had been extended to it, but the difference between the law of France and the law of Spain when applied to colonial conditions was not great enough to make any special solution of continuity. The net result was that when we acquired the Louisiana purchase in 1803, its laws and jurisprudence were quite similar to those that now prevail in Porto Rico, Cuba, and the Philippines; and the question naturally arose as to what should be done. It was considered, as we have seen, that no state carved out of this purchase should ever be admitted to the Union with a Spanish

system of jurisprudence in criminal matters. But the Territory of Orleans had a considerable population who had been living for about a century under a system of private law in civil matters derived from France and Spain. The government of the United States acted very wisely in not undertaking to change what had thus become interwoven with the social life and proprietary rights of the people. It was only in criminal matters that by the legislation of 1805 the common law of England was adopted as a basis of definition and practice. The law in civil matters remained unchanged and was left to its natural development.

It is submitted that a similar course should be followed with reference to Porto Rico and the Philippines as well as with reference to Cuba, if we are to have anything to say in regard to that "Pearl of the Antilles." It is quite likely that some modification ought to be made in regard to the definition of crimes and offenses and the method of criminal procedure, but so far as private law in civil matters is concerned, there is no better system on the face of the earth than that which is represented by the Spanish codes I have attempted to describe.

No doubt in past years, in the administration of justice in these islands, there has been a good deal of malfeasance. But such malfeasance should not distract our attention from the scientific value of these codes. The best law may be badly administered, and may thus become an engine of abuse, but when we have good laws honestly and intelligently administered, then we have an ideal condition of jurisprudence. Let us hope, then, that no effort will be made to disturb the general system of law in our new possessions so far as it concerns civil matters.

As for Mexico, Central America, and South America, it may be stated, in a general way, that they have all derived their systems of law and jurisprudence from Spain during the colonial period, so that Spanish law of the sixteenth, seventeenth, and eighteenth centuries, as applied to colonial conditions, is fundamental in those countries. We may take Mexico as a type. Conquered by Cortez in 1521, the first Spanish viceroy was appointed in 1535, and from that time until Mexico achieved her independence in the early part of the nineteenth century, the law of Spain was there gradually developed and applied, under such local regulations and decrees as were promulgated through the Council of the Indies. At present, Mexico is a federal republic, resembling our own country in its combination of national and state governments. As

I understand, it consists of a Federal District, which may be likened in some respects to our District of Columbia, — of twenty-seven states and one territory, called Lower California. A civil code was adopted by the federal authority in 1871. It could extend by its own force only to the Federal District and to Lower California; but it was a work of such manifest merit that it was adopted by almost all the states — I believe by twenty-five out of twenty-seven — so that uniformity of jurisprudence was largely secured. It was amended in 1884, and, as amended, constitutes an important and scientific body of law, resembling the modern civil codes of other countries in its principles, with some provisions, of course, of local character. Generally speaking, it may be said that it treats of the law of persons, their domicile and status, of artificial or legal persons, of property and its various modifications, and of obligations.

We need not dwell on further details in regard to Central America and South America, and must leave that part of the subject with the remark, simply, that Roman and civil law, as handed down by Spain, may be considered as fundamental in those countries.

It would seem that students of law in our country may well begin to acquaint themselves with the elements, at least, of this legal system, which, as we have seen, prevails in so many regions of the western hemisphere, and in the thousand islands we have acquired in the East. The task is not so difficult as it may seem. Assuming that the student has a fair knowledge of the leading principles of Roman law, and comprehends the meaning of its technical terms, which appear sometimes alien and mystical, he may read the codes of France, Canada, Louisiana, and Spain with interest and understanding. And he will find that, after all, the difference between the civil law and the common law is by no means so great as some persons imagine. About a year ago in reply to some questions by Professor Maitland, submitted to me by our lamented friend Professor Thayer, I tried to express this idea in these words: —

"If you eliminate from the English law the peculiarities of the tenure and transmission of real estate which are largely feudal or social in origin; if you further eliminate, as they are doing in England, the technicalities of common law pleading; if you leave out some rules of evidence, which, as you well know, have grown

up around the practice before the English common jury, — the rest of English common law will be found not to differ very much from the civil law in those elementary principles which are essential to the administration of justice between man and man. There are differences of terminology, which, to some, seem strange and alien, but when they are once understood, the leading doctrines are found to be much the same. And to me it is very interesting to notice how the English judges continually fall back on the Roman and civil law as a ground of refuge in time of mental perplexity. You will doubtless recall the case of Berchervaise *v.* Lewis, L. R. 7 Common Pleas, where neither counsel nor court could find any English precedent in point, and the decision was finally made on the authority of a text from the Pandects. We might inquire why the court should cite the Pandects unless in some perhaps sub-conscious way the doctrines of the classical jurists underlie even English law."

William Wirt Howe.

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